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No. 95-2034

In the Supreme Court of the United States

OCTOBER TERM, 1995

KARL A. SCHLEDWITZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the government's failure to disclose an FBI report of an interview with an unindicted co-conspirator entitled petitioner to a new trial under *Brady* v. *Maryland*, 373 U.S. 83 (1963).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is unpublished, but the judgment is noted at 72 F.3d 130 (Table). An opinion dissenting from the denial of rehearing en banc (Pet. App. 37a-42a) is reported at 86 F.3d 73. The opinions of the district court (Pet. App. 29a-33a, 34a-35a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1995. A petition for rehearing was denied on March 18, 1996. Pet. App. 36a. The petition for a writ of certiorari was filed on June 17, 1996 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted on three counts of mail fraud, in violation of 18 U.S.C. 1341 and 1342. He was sentenced to six months' confinement in a halfway house. The court of appeals affirmed. Pet. App. 13a-20a. Petitioner subsequently moved for a new trial pursuant to Federal Rule of Criminal Procedure 33, arguing that the government had failed to disclose a report of an FBI interview in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963). The district court denied petitioner's motion for a new trial, Pet. App. 29a-33a, and denied his motion for reconsideration, *id.* at 34a-35a. The court of appeals affirmed. *Id.* at 1a-12a.

1. The charges of which petitioner was convicted stemmed from loans made to him by various banks owned or controlled by Jacob (Jake) F. Butcher and his brother, C.H. Butcher, Jr. Counts One through Three of the indictment alleged that petitioner received more than $1 million in loans between 1979 and 1982, although his income during that period was insufficient to justify the loan amounts.[1] The proceeds of the loans were largely used for the personal benefit of the Butchers, and petitioner therefore was a mere "nominee" on the loans. Petitioner was not

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[1] Petitioner was convicted on Counts One through Three of the indictment, all of which charged a scheme to defraud banks controlled by the Butchers. C.A. App. 14-21. Counts Four through Eight alleged a scheme on petitioner's part to defraud the successors in interest to the failed Butcher banks. *Id.* at 21-25. The district court dismissed Counts Four through Eight at trial, on the ground that there was no evidence that petitioner could have repaid any more money than he did to the successors in interest. Pet. App. 2a.

personally responsible for repaying the loans, but instead used further loans from Butcher-controlled institutions to cover the interest payments. In return for being a "player" in the Butcher organization, petitioner, a lawyer, was entitled to keep some of the loan proceeds and received legal work from the Butchers. Pet. App. 13a-14a; C.A. App. 14-16. In total, petitioner borrowed more than $1.5 million between 1979 and 1982, in which years petitioner had annual income of $34,313, $28,385, $31,994, and $52,163, respectively. Pet. App. 14a & n.1.

In proving Count One of the indictment,[2] the government established that in 1979, petitioner "borrowed" approximately $450,000 from banks controlled by Jake Butcher. Petitioner's income in 1979 was $34,313; in the preceding year, his income was $13,293. Pet. App. 3a, 14a n.1. The proceeds of those loans were used to purchase stock in United American Bank (UAB) of Knoxville—a bank controlled by Jake Butcher. Jesse Barr, a close associate and self-described "alter ego" of Jake Butcher's (C.A. App. 431), testified that Jake had asked petitioner to buy the UAB stock because Butcher wanted to maintain the price of the stock by creating a market for it. Barr also testified that he had "handled" petitioner's stock loan at Butcher's request. *Id.* at 449-450, 452. Barr testified, however, that nothing about the stock transaction was illegal and that he did not believe peti-

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[2] Only Count One is discussed in detail, because the exculpatory statements that petitioner contends were not disclosed concern only the fraudulent transaction alleged in that count.

tioner had ever committed any crimes. *Id.* at 481, 491. Neither of the Butcher brothers testified at trial.[3]

2. On August 17, 1994, after his conviction had been affirmed on appeal (Pet. App. 13a-20a), petitioner moved for a new trial pursuant to Federal Rule of Criminal Procedure 33. Petitioner asserted that the government had improperly failed to disclose information concerning exculpatory statements made by Jake Butcher during an interview with agents of the Federal Bureau of Investigation (FBI). Pet. App. 4a-5a. The government maintained that it had disclosed the FBI report of the Jake Butcher interview in petitioner's 1990 prosecution in the Western District of Tennessee. *Id.* at 5a. Petitioner's attorneys from the earlier trial provided affidavits denying any knowledge of such an interview. *Id.* at 5a, 31a. For purposes of petitioner's motion for a new trial, the district court assumed that the interview report (known as an "FBI 302" or "302") had never been disclosed to petitioner. *Ibid.*

The government then produced an FBI 302 report memorializing an interview conducted with Jake

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[3] The fraudulent scheme charged in Counts Two and Three of the indictment concerned transactions with banks controlled by C.H. Butcher, Jr. The government alleged and proved that petitioner had received a series of loans from C.H. Butcher's banks, and that petitioner had used part of the proceeds of those loans to pay off C.H. Butcher's gambling debt at the Aladdin Hotel and Casino in Las Vegas. C.A. App. 17-18; Horne 7/13/92 Tr. 23-26; Horne 7/15/92 Tr. 1-8; Gov't Exh. 25-28, 60. In addition, the government proved that as part of the overall scheme to defraud, petitioner had "borrowed" $55,810 from UAB of Knoxville, the proceeds of which were used by C.H. Butcher to purchase insurance. C.A. App. 16; Horne 7/13/92 Tr. 17-22; Gov't Exh. 18, 56-59.

Butcher at the Federal Prison Camp in Atlanta, Georgia on October 29, 1985. With respect to the UAB stock transaction, Butcher stated that he had approached petitioner, who was his friend, about the purchase of UAB stock because Butcher wanted people to buy the stock in order to maintain a market for it. C.A. App. 288-289, 291. Butcher could not remember whether he had arranged the financing for petitioner's purchase of the stock, although he had done so for other individuals. He denied that petitioner was holding the stock in trust for him or that petitioner was obligated to give Butcher the proxy vote on the stock. *Id.* at 289, 291. Butcher also stated that he had never told petitioner that interest payments on the stock loan would be made by or through Butcher. *Id.* at 291. Butcher denied having directed other people to petitioner's legal practice, but he stated that petitioner had represented Butcher in some corporate matters. *Id.* at 291, 292.

The FBI 302 also revealed that Special Agent J. Alan Horne of the Internal Revenue Service had been present at the interview of Jake Butcher. C.A. App. 288. Horne, who had since left government service, testified as an expert witness for the government at petitioner's trial. Pet. App. 6a.

In moving for a new trial, petitioner submitted affidavits from his trial counsel explaining how the FBI 302 report could have been used to bolster his defense. See C.A. App. 283-285, 347-348. Trial counsel asserted that Horne "could have been cross-examined * * * concerning the facts of Mr. Butcher's statement to him and it would have been brought out that Mr. Butcher did not consider [petitioner] to have been a nominee." *Id.* at 285. Counsel also stated that the report could have been used to "impeach[] the per-

ceived objectivity of [Horne], the Government's sole expert witness." *Id.* at 348. Finally, counsel suggested that Jake Butcher's attorney, who was present at the interview, might have been called as a defense witness if the 302 report had been disclosed to the defense. *Ibid.* The affidavits did not suggest that Butcher himself would have been called as a witness if counsel had been made aware of the report.

3. The district court denied petitioner's motion for a new trial. Pet. App. 29a-33a. The court applied the standard articulated in *United States* v. *O'Dell*, 805 F.2d 637, 640 (6th Cir. 1986), cert. denied, 484 U.S. 859 (1987), which requires the movant to establish: (1) that the new evidence was discovered after trial; (2) that the evidence could not have been discovered earlier with due diligence; (3) that the evidence is material and not merely cumulative or impeaching; and (4) that the evidence would likely produce an acquittal. Pet. App. 30a. The court explained that

> while Mr. Butcher's statements are favorable to [petitioner] in that they suggest that there was nothing wrong with the loan, this testimony can hardly come as a surprise to [petitioner]. Mr. Butcher was well known to be friendly and available as a witness and both Jake and C.H. Butcher were known to have testified that there was nothing illegal about [petitioner]'s role in their banking maneuvers.

Id. at 32a. The court also noted that "[b]oth the Butcher brothers were known to be friendly and available as witnesses for [petitioner]," and that, "even if they had been called, their testimony would have been merely cumulative to that of Jesse Barr." *Id.* at 33a. The district court subsequently denied

petitioner's motion for reconsideration. *Id.* at 34a-35a.

4. The court of appeals affirmed. Pet. App. 1a-12a. The court first held that the district court had applied an incorrect legal standard in ruling on petitioner's motion for a new trial. When such a motion is based on evidence specifically requested by the defendant and not disclosed by the government, the court of appeals explained, the question is whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 8a, quoting *O'Dell*, 805 F.2d at 641 (quoting *United States* v. *Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.); *id.* at 685 (White, J., concurring)). Citing *Kyles* v. *Whitley*, 115 S. Ct. 1555 (1995), the court of appeals further explained that *Bagley*'s materiality standard does not require the defendant to show by a preponderance of the evidence that disclosure of the suppressed evidence would likely have resulted in an acquittal, or that the untainted evidence would have been insufficient to sustain a conviction. Pet. App. 9a. Finally, the court noted that the materiality of the undisclosed evidence must be evaluated cumulatively. *Ibid.*

The court of appeals concluded, however, that the undisclosed FBI 302 report was not material. The court explained:

> It can hardly be argued by [petitioner] that the statements made by Butcher meet the *Bagley* materiality test since [petitioner] had to be aware of Butcher's opinion contained in the FBI 302 report. The district court found that "Mr. Butcher was well known to be friendly and available as a witness [and] known to have testified that there was

> nothing illegal about [petitioner's] role in [his] banking maneuvers." Indeed, [petitioner's] counsel interviewed Butcher prior to the trial. Clearly, [petitioner's] counsel could have called Jake Butcher to the stand at the trial to elicit his favorable statements, but they chose not to do so. Since [petitioner] should have been aware of Butcher's opinions, the failure to provide [petitioner] with the FBI 302 report is not a denial of a fair trial with regard to Butcher's substantive comments. See *United States* v. *Todd*, 920 F.2d 399, 405 (6th Cir. 1[9]90) (holding that there is no *Brady* violation when the defendant "was aware of the essential facts that would enable him to take advantage of the exculpatory evidence").

Pet. App. 10a-11a (citation omitted).

The court of appeals then addressed petitioner's contention that the 302 report could have been used to impeach Horne's credibility as an expert witness by demonstrating Horne's prior involvement in the investigation of petitioner. Pet. App. 11a. The court acknowledged that "[w]ithout the FBI 302 report, [petitioner] had no way of knowing of the existence of the 1985 interview with Butcher and Horne's role in it." *Ibid.* The court concluded, however, that "[t]he absence of this 'impeaching evidence' from the trial does not 'undermine[] confidence in the outcome of the trial' and does not 'deprive[] the defendant of a fair trial.'" *Ibid.* (quoting *Bagley*, 473 U.S. at 677). The court therefore affirmed the district court's decision "since, under the correct standard, there is no reasonable probability that the outcome of the trial would have been different." Pet. App. 11a.

5. The court of appeals denied rehearing and rehearing en banc. Pet. App. 36a. Chief Judge Merritt, joined by Judge Martin, filed an opinion dissenting from the denial of rehearing en banc. *Id.* at 37a-42a. The dissenting judges explained:

> Although it is true that [petitioner] knew that Butcher could possibly be helpful as a witness if called, [petitioner's] counsel were evidently afraid that without a prior written statement with which to examine Butcher, Butcher would probably cave in to government pressure and testify falsely against their client or give equivocal testimony. * * * In the absence of a prior statement, counsel would be defenseless if Butcher turned against [petitioner] or gave equivocal testimony.

Id. at 38a. If the 302 report had been available, the dissenting judges surmised, "the defense might have called Butcher and put [petitioner] on the stand rather than follow the unsuccessful strategy adopted in the absence of knowledge of the statement." *Id.* at 39a. The dissenting judges also asserted that "evidence of Horne's presence at the 1985 Butcher interview, a fact unknown to [petitioner] at trial, could have been used by [petitioner] to debunk the false appearance created for the jury that Horne was a disinterested expert hired by the government to review [petitioner's] financial records." *Id.* at 40a.

ARGUMENT

Petitioner contends (Pet. 9-13) that review by this Court is warranted to resolve a conflict among the circuits concerning the scope of the government's disclosure obligations under *Brady*. As we explain below, no circuit conflict exists. Even if a conflict did

exist, moreover, the instant case would be an inappropriate vehicle for resolving it. Petitioner claims that the court of appeals' resolution of this case rested on a determination that petitioner's trial counsel should, in the exercise of due diligence, have acquired additional information relevant to his client's defense. In fact, however, the court of appeals also appears to have concluded that in light of the information that petitioner's trial counsel *actually possessed*, disclosure of the 302 report would not have created a reasonable probability of a different result. We believe that the court of appeals' holding in that respect is correct. In any event, the correctness of that holding turns on the application of an established legal standard to a unique set of facts. This case therefore presents no question warranting this Court's review.

1. In *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." The Court has subsequently explained that "favorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles* v. *Whitley*, 115 S. Ct. 1555, 1565 (1995) (quoting *United States* v. *Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.)). This Court's decisions make clear that no *Brady* violation occurs when the government fails to disclose exculpatory evidence that the defense in fact possesses. See *United States* v. *Agurs*, 427 U.S. 97, 103 (1976) (*Brady* governs situations involving "the discovery, after trial, of information which had been

known to the prosecution but unknown to the defense"); *Giles* v. *Maryland*, 386 U.S. 66, 96 (White, J., concurring) (1967) ("[A]ny allegation of suppression boils down to an assessment of what the State knows at trial in comparison to the knowledge held by the defense."). That principle follows from the Court's definition of "materiality": if the defense actually possesses information withheld by the prosecution, there can be no reasonable probability that its disclosure by the government would alter the outcome of the trial.

2. As petitioner correctly notes (see Pet. 10-11), some courts of appeals have also held that the government's non-disclosure of exculpatory evidence does not violate *Brady* when the defendant does not actually possess the evidence in question but could discover it in the exercise of due diligence. See, *e.g.*, *United States* v. *Meros*, 866 F.2d 1304, 1308 (11th Cir.) ("To establish a *Brady* violation a defendant must prove * * * that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence."), cert. denied, 493 U.S. 932 (1989); *Barnes* v. *Thompson*, 58 F.3d 971, 975 n.4 (4th Cir. 1995) ("*Brady* requires that the government disclose only evidence that is not available to the defense from other sources, either directly or through diligent investigation."). The Sixth Circuit has stated that the nondisclosure of possibly exculpatory material does not violate *Brady* when the "defendant was aware of the essential facts that would enable him to take advantage of the exculpatory evidence." *United States* v. *Todd*, 920 F.2d 399, 405 (1990). Those decisions can be understood to flow from this Court's admonition that the purpose of the *Brady* rule "is not to displace the adversary system as the primary

means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur." *Bagley*, 473 U.S. at 675.

3. Petitioner contends (Pet. 12-13) that the decisions cited above are in conflict with the Tenth Circuit's decision in *Banks* v. *Reynolds*, 54 F.3d 1508 (1995). That contention is incorrect.

In *Banks*, the prosecution failed to inform the defense that two other suspects had previously been arrested for the crime of which the defendant was later convicted. The court of appeals stated that "[i]n order to establish a *Brady* violation, a habeas petitioner must show that: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the accused; and (3) the evidence was material to the defense." 54 F.3d at 1516. The court rejected the prosecution's contention that it was not required to disclose the information regarding the prior arrests. The court offered the following analysis:

> Whether the defense knows or should know about evidence in the possession of the prosecution certainly will bear on whether there has been a *Brady* violation. Obviously, if the defense already has a particular piece of evidence, the prosecution's disclosure of that evidence would, in many cases, be cumulative and the withheld evidence would not be material.
>
> However, the prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge. Simply stated, if the prosecution possesses evidence that, in the context of a particular case is obviously exculpatory, then it has an obligation to disclose it to defense counsel whether a general request is

> made or whether no request is made. In this case, the fact that defense counsel "knew or should have known" about the [pertinent] information, therefore, is irrelevant to whether the prosecution had an obligation to disclose the information. The only relevant inquiry is whether the information was "exculpatory."

Id. at 1517 (citations, brackets, and internal quotation marks omitted).[4] After determining that "the prosecution breached its obligation to disclose exculpatory evidence to the defense," *id.* at 1518, the court proceeded to "consider whether the withheld evidence was material," *ibid.*, and concluded, after lengthy analysis, that it was, see *id.* at 1518-1522.

The Tenth Circuit in *Banks* expressly acknowledged that the information the defense "knows or should know" is relevant to the question whether the withheld evidence is "material," and thus to the ultimate determination whether a *Brady* violation has occurred. The Tenth Circuit's approach differs from that adopted by other courts of appeals only insofar as the *Banks* court suggested that the government's obligation to disclose particular evidence can be determined without reference to the materiality of that evidence—*i.e.*, that the prosecution is

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[4] The *Banks* court also stated, however, that it "accept[ed] the [district] court's finding that [defense counsel] neither knew nor should have known about the withheld evidence." 54 F.3d at 1518. The court's statement that the prosecution's disclosure obligation is unaffected by what the defense knows or should know was therefore dictum. See *ibid.* ("Even were we to adopt the State's position, that the prosecution has no duty to disclose information which the defense knows or should know about, we would still conclude that, in this case, the prosecution breached its duty under *Brady*.").

obligated to disclose even non-material exculpatory information. That aspect of the Tenth Circuit's analysis appears contrary to this Court's precedents. See *Agurs*, 427 U.S. at 108 ("[T]he prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial."); *Kyles*, 115 S. Ct. at 1568 (Court's *Brady* jurisprudence "does not tax the prosecutor with error for any failure to disclose, absent a further showing of materiality"). The crucial point, however, is that that aspect of the Tenth Circuit's approach will have no practical effect on the ultimate resolution of a defendant's *Brady* claim. The Tenth Circuit recognized that a *Brady* violation occurs only where the suppressed evidence is "material," 54 F.3d at 1516, and that "[w]hether the defense knows or should know about evidence in the possession of the prosecution certainly will bear on whether there has been a *Brady* violation," *id.* at 1517. Petitioner's claim of a circuit conflict is therefore without foundation.[5]

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[5] Petitioner's reliance (Pet. 12-13) on *Hatch* v. *Oklahoma*, 58 F.3d 1447, 1470 n.17 (10th Cir. 1995), cert. denied, 116 S. Ct. 1881 (1996), is similarly misplaced. Relying on *Banks*, the court in *Hatch* declined to consider the state of the defense's knowledge *in determining whether the prosecution had suppressed evidence.* 58 F.3d at 1469-1470 & n.17. Because it concluded that "petitioner ha[d] not alleged any facts showing that the prosecution suppressed evidence," *id.* at 1469-1470, the court had no occasion to consider the question of materiality. Nothing in *Hatch* casts doubt on the *Banks* court's conclusion that the range of information the defense knows or should know is relevant to the question whether any suppressed evidence is material.

4. Even if a circuit conflict did exist, this case would be an inappropriate vehicle for its resolution. Contrary to petitioner's contention (Pet. 8), the court of appeals' decision in the instant case does not rest solely on a determination that petitioner's trial counsel failed to exercise due diligence in acquiring evidence about Jake Butcher's exculpatory statements. Rather, the court also indicated that petitioner was in fact aware of Butcher's view that petitioner's banking activities were not illegal. The relevant paragraph of the court of appeals' opinion is as follows:

> It can hardly be argued by [petitioner] that the statements made by Butcher meet the *Bagley* materiality test since [petitioner] had to be aware of Butcher's opinion contained in the FBI 302 report. The district court found that "Mr. Butcher was well known to be friendly and available as a witness [and] known to have testified that there was nothing illegal about [petitioner's] role in [his] banking maneuvers." Indeed, [petitioner's] counsel interviewed Butcher prior to the trial. Clearly, [petitioner's] counsel could have called Jake Butcher to the stand at the trial to elicit his favorable statements, but they chose not to do so. Since [petitioner] should have been aware of Butcher's opinions, the failure to provide [petitioner] with the FBI 302 report is not a denial of a fair trial with regard to Butcher's substantive comments. *See United States* v. *Todd*, 920 F.2d 399, 405 (6th Cir. 1[9]90) (holding that there is no *Brady* violation when the defendant "was aware of the essential facts that would enable him to take advantage of the exculpatory evidence").

Pet. App. 10a-11a (citation omitted).

Petitioner offers the following critique of the court's analysis:

> The court of appeals never considered the exculpatory nature of the FBI 302—which, without more, should have sufficed to warrant its disclosure. The court likewise never analyzed the importance of that document—which, without more, should have satisfied the materiality standard under *Brady*. Instead, the court focused solely on petitioner's diligence in finding the evidence on his own.

Pet. 14. That assessment will not withstand scrutiny. The court of appeals did not suggest that petitioner should have obtained the FBI 302 on his own, through the exercise of due diligence. The court noted that petitioner had "requested all reports from any interviews with Jake Butcher and relied on the prosecutor's representation that all reports had been produced." Pet. App. 11a. And, rather than ignoring the "exculpatory nature" and "importance" of the 302 report (Pet. 14), the court took those points for granted, but found that the report was immaterial in light of what petitioner already knew about Butcher's opinions. Thus, the court quoted the district court's finding that "Mr. Butcher was well known to be friendly and available as a witness [and] known to have testified that there was nothing illegal about petitioner's role in their banking maneuvers." Pet. App. 10a. The court of appeals also stated that the report was immaterial because petitioner "had to be aware of Butcher's opinion contained in the FBI 302 report." *Ibid.* The court concluded that "[petitioner's] counsel could have called Jack Butcher to

the stand at the trial to elicit his favorable statements, but they chose not to do so." *Ibid.* Only *after* making those statements did the court also state that because "petitioner should have been aware of Butcher's opinion," the failure to disclose the report was not a denial of a fair trial. *Id.* at 10a-11a. Thus, the court's analysis, taken as a whole, does not rest on a simple conclusion that petitioner failed to exercise due diligence in learning of Butcher's opinion. The legal issue that petitioner raises is therefore not squarely presented by this case.

Petitioner also faults (Pet. 15) the court of appeals for failing to consider the exculpatory value of the FBI 302 report itself—"separate and apart from" its recitation of Butcher's opinion. That factbound claim raises no legal issue of importance. In any event, the court of appeals did not make such an error. Petitioner argues (Pet. 15) that "[a]rmed with the prior written statement, the defense could have called Jake Butcher—an otherwise recalcitrant witness—secure in the knowledge that the prior statement would afford a refreshed recollection, rehabilitation, or impeachment." Petitioner, however, never made that argument to the trial court or the appellate panel. See Pet. C.A. Reply Br. 24-25 (describing ways in which 302 report could have been used without suggesting that Butcher would have been called as a witness); C.A. App. 283-285, 347-348 (affidavits submitted to the district court). Petitioner's only argument about the potential use of the report itself was that it might have been valuable in impeaching Agent Horne—an argument the court of appeals addressed and rejected. See Pet. App. 9a-11a (describing and

rejecting petitioner's arguments).[6] Because petitioner never suggested that counsel would have called Butcher to testify if the 302 report had been available, he cannot make that argument for the first time in this Court.

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[6] Petitioner renews that argument here, stating that with the 302 report he could "have 'debunk[ed] the false appearance created for the jury that Horne was a disinterested expert hired by the government to review [petitioner's] financial records.'" Pet. 15-16 (quoting Pet. App. 40a). The court of appeals acknowledged that the 302 report might have been used in that manner. Pet. App. 11a. The court concluded, however, that "this type of impeachment does not satisfy the *Bagley* materiality standard" because "there is no reasonable probability that the outcome of the trial would have been different." *Ibid.* Petitioner disagrees with that conclusion, but he cannot quarrel with the legal standard applied by the court of appeals. Petitioner also contends in this Court that "through a skillful use of the Butcher memo during the cross-examination of Agent Horne, the defense could have called attention to *the government's failure* to call Jake Butcher as a witness." Pet. 16. The affidavits submitted to the district court by petitioner's trial counsel did not suggest that the 302 report would have been used in that manner. See C.A. App. 283-285, 347-348. In any event, the defense did not need the 302 report to make that point. In fact, defense counsel argued pointedly in closing statements that the jury had not heard from Jake Butcher. See 7/16/92 Closing Tr. 46, 57.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1996